United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

S.A.M. DATE: October 26, 2015

TO: Charles L. Posner, Regional Director
Region 5

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Sentara Healthcare, Inc. d/b/a Medical Transport, LLC
Case 05-CA-145731

512-5030-8000
512-5030-8050
512-5030-8075

This case was submitted for advice on whether an employer violated Section 8(a)(1) by issuing a litigation hold and document preservation notice to employees who had filed an employment-related collective action lawsuit against it. We conclude that the employer violated the Act because the notice is overbroad and would reasonably tend to chill the employees' exercise of their Section 7 right to engage in collective action litigation related to their employment. We emphasize that our conclusion here does not extend generally to litigation hold notices; properly drafted, such notices fulfill an employer's legal obligation to avoid spoliation of evidence without infringing on employee rights protected by the Act.

FACTS

Sentara Healthcare, Inc. d/b/a Medical Transport, LLC ("the Employer") provides ambulance transportation services throughout Virginia. The Charging Party worked as (b) (6), (b) (7)(C) ((b) (6), (b) (7)(C)) for the Employer from (b) (6), (b) (7)(C) until (b) (6), (b) (7)(C) in (b) (6), (b) (7)(C). On (b) (6), (b) (7)(C) the Charging Party and several other current and former ambulance crew employees filed a collective action suit against the Employer in the U.S. District Court for the Eastern District of Virginia, alleging that the Employer violated the Fair Labor Standards Act ("FLSA") by failing to pay them (and other similarly situated employees) appropriate overtime compensation. In particular, the complaint alleged that the Employer: deducted lunch-break time from employees, even when no lunch break had been provided to them; required employees to take calls and respond to emails and text messages during off-duty hours, without compensation; required employees to maintain certain certifications and licenses, but failed to compensate them for the associated training time; and required employees to perform various types of work while off duty, without compensation.

On December 3, 2014, the Employer emailed a document entitled "Litigation Hold and Document Preservation Notice" ("the notice") to 17 employees, all but one of whom were named plaintiffs in the FLSA suit, as well as to several human resources and management personnel. The subject line of the notice read "Litigation Hold Notice– Effective Immediately" and listed the case name of the FLSA suit, i.e., "[*Charging Party*] *et al. v. Medical Transport LLC*." The notice specifically outlined the allegations made in the FLSA complaint and stated that the Employer "has a legal duty to preserve all records . . . and documents . . . that are, or may be, relevant to the potential dispute." The notice continued:

> You have been identified as someone who may be in possession of documents or records that could be relevant to this dispute. Thus, you are required to continue to preserve and retain all potentially relevant records and documents. Strict compliance with this notice is required as a condition of employment, as non-compliance could result in the loss of evidence and potential sanction against the company.
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> At this time, you are only required to preserve potentially relevant records and documents and therefore should not alter or destroy them. You do not need to make copies or otherwise distribute any potentially relevant document. Accordingly, you should take steps to preserve all potentially relevant documents and records, no matter their form, and even if they appear on your personal cell phone, personal computer, personal social media page, or personal journal/diary/calendar, among other things.
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> **What to Preserve:** Potentially relevant documents or records may include, but are not necessarily limited to:
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> - Any documents or records about or concerning EMTs and/or Paramedics regarding any of the allegations;
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> - Any documents or records which reflect, demonstrate or discuss Medical Transport EMTs' or Paramedics' attendance, participation, and/or travel at trainings, seminars, or other continuing professional educational courses;
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> - Any documents or records evidencing or refuting that employees in these positions' [*sic*] performed work while off-the-clock;
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> - Any documents or records evidencing or refuting that employees in these positions missed or performed work during a meal break.

- Any documents or records evidencing or reflecting non-work related activities engaged in by employees in these positions while on the clock or while allegedly performing work off the clock.

Potentially relevant documents and records must be preserved whether in electronic or paper format, and whether contained on personal or Company-owned computers, phones or devices. If you have any doubts as to whether any documents, records, communications, or information in your possession or control are relevant, err on the side of preservation.

* * *

Sentara takes its preservation obligation very seriously and, therefore, failure to comply with this notice could result in discipline up to and including termination of employment.

Attached to the notice was an acknowledgment page that employees were expected to sign and return to the Director of Human Resources. Employees subsequently contacted the attorneys representing them in the FLSA lawsuit, who advised them not to sign the notice. None of the employees named in the lawsuit has done so, and the Employer has not disciplined any of them for that failure. According to the Charging Party, since the notice was issued, employees have stopped discussing the FLSA suit and their employment via text messaging and social media so as to avoid having to retain and disclose to the Employer records of those discussions.

In general, employees use Employer-provided radios and pagers when communicating with the Employer. However, employees use their personal cell phones to: (1) communicate with dispatch and their team leader when they are in remote areas with weak radio signals; (2) discuss work-related matters with their team leader; and (3) communicate with other employees. One employee witness stated that (b) (6), (b) used (b) (6), (b) personal cell phone about 1% of the time to communicate with (b) (6), (b) (7) team leader and about once a week to communicate with dispatch. Another employee stated that using (b) (6), (b) (7) personal cell phone was convenient but not mandatory. With respect to the FLSA lawsuit, the parties reached agreement on the terms of a settlement on (b) (6), (b) (7)(C) That settlement is currently pending court approval.

ACTION

We conclude that the Employer violated Section 8(a)(1) by issuing the notice to employees because it was overbroad and would reasonably tend to chill employees' exercise of their Section 7 rights. Specifically, we find unlawful those portions of the notice that reference, or would reasonably be read to encompass, documents and records contained on the employees' personal devices (as opposed to Employer-owned

devices), as well as those portions of the notice that suggest to employees that compliance with the notice is a condition of their employment. Although there is insufficient evidence to find that the Employer had an unlawful motive in issuing the notice, we conclude that its need for promulgating the notice, as written, is outweighed by the employees' rights under the Act.

A. The Act

Section 7 protects an employee's right to pursue employment-related grievances, either with or on behalf of other employees, through collective or class action lawsuits.[1] It also protects an employee's right to engage in activities connected to pursuing such a lawsuit.[2] In addition, the Act protects the right of employees to keep their Section 7 activities confidential from their employer.[3] The Board has deemed

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[1] *Beyoglu*, 362 NLRB No. 152, slip op. at 1-2 (July 29, 2015) (Section 7 protects individual employee's filing of employment-related class or collective action lawsuit); *D.R. Horton, Inc.*, 357 NLRB No. 184, slip op. at 2 & nn.3-4 (Jan. 3, 2012) ("The Board has long held, with uniform judicial approval, that the NLRA protects employees' ability to join together to pursue workplace grievances, including through litigation."), *enforcement denied in part*, 737 F.3d 344 (5th Cir. 2013); *Le Madri Restaurant*, 331 NLRB 269, 275 (2000) (citing cases) ("It is well settled that the filing of a civil action by employees is protected activity unless done with malice or in bad faith.").

[2] *Salt River Valley Water Users Association*, 99 NLRB 849, 853–854 (1952) (Section 7 protected employee's circulation among coworkers of petition designating him as their agent to seek back wages under the FLSA), *enforced*, 206 F.2d 325 (9th Cir. 1953); *see also Saigon Grill Restaurant*, 353 NLRB 1063, 1064-65 (2009) (employer violated Act when it ordered mass discharge in retaliation for group of employees having signed document authorizing an attorney to file a wage and hour lawsuit on their behalf against employer).

[3] *Guess?, Inc.*, 339 NLRB 432, 434-35 & n.8 (2003) ("[E]mployees are guaranteed a certain degree of assurance that their Sec. 7 activities will be kept confidential, if they so desire."); *Chino Valley Medical Center*, 362 NLRB No. 32, slip op. at 1 n.1 (Mar. 19, 2015) (finding employer's subpoena unlawful because it "would subject employees' Sec. 7 activities to unwarranted investigation and interrogation"; subpoena encompassed communications between employees and union, union authorization and membership cards, and all documents relating to those cards); *see also Laguna College of Art and Design*, 362 NLRB No. 112, slip op. at 1 n.1 (June 15, 2015) (upholding ALJ's decision to quash employer's subpoena that sought prounion supervisor's personal email and text messages relating to organizing campaign and representation election; employer's interests outweighed by interests of supervisor

this confidentiality interest "substantial" because the willingness of employees to engage in protected concerted activities "would be severely compromised" if an employer could easily obtain information about those activities.[4]

An employer violates Section 8(a)(1) when it takes action that "reasonably tend[s] to chill employees in the exercise of their Section 7 rights."[5] Indeed, the Board has found that an employer violates the Act when it conveys to employees its concern about their protected activity, even when it does not seek to ascertain the content of that activity.[6] For example, in *Waggoner Corp.*, an employer violated Section 8(a)(1) when it told employees that they could obtain, and then assisted them in obtaining, copies of statements they had given to a Board agent investigating unfair labor practice charges.[7] Although the employer did not itself request the statements or ask about their contents, the Board explained that its actions interfered with the employees' Section 7 rights because those actions "would necessarily impress employees with the [employer's] concern for the matters related by them to the Board," and "an employee's knowledge that his employer has manifested an interest in what the employee has to say about him can only exert an inhibitory effect upon the employee's willingness to give a statement at all, much less a statement which might contain matters damaging to the employer."[8] Similarly unlawful is employer

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and coworkers "in keeping their Sec. 7 activity confidential"); *Santa Barbara News-Press*, 358 NLRB No. 155, slip op. at 2 (Sept. 27, 2012) (finding employer's subpoenas "inherently coercive and unlawful" because they sought copies of affidavits the employees had provided to the Board during the course of an unfair labor practice investigation; such requests were inconsistent with keeping "employee attitudes, activities, and sympathies in connection with the union" confidential), *adopted by* 361 NLRB No. 88 (Nov. 3, 2014); *National Telephone Directory Corp.*, 319 NLRB 420, 421 (1995) (emphasizing that "[t]he confidentiality interests of employees have long been an overriding concern to the Board" and denying employer's motion seeking production of union authorization cards and names of employees who signed authorization cards or attended union meetings).

[4] *Guess*, 339 NLRB at 435.

[5] *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), *enforced mem.*, 203 F.3d 52 (D.C. Cir. 1999).

[6] *Waggoner Corp.*, 162 NLRB 1161, 1162-63 (1967).

[7] *Id.* at 1162.

[8] *Id.* at 1162-63.

conduct, such as surveillance activity, that "reasonably tend[s] to coerce and restrain [employees] by creating a fear among them that the record of their concerted activities might be used for some future reprisals."[9]

In *Guess*, the Board announced a framework for assessing the lawfulness of an employer's questioning about employees' protected concerted activities during a legal proceeding. Specifically, it held that, in order to be lawful, an employer's questioning must be relevant and must not have an "illegal objective." In addition, even if the questioning is relevant and without an illegal objective, it is unlawful unless the employer's need for the information outweighs the employees' Section 7 confidentiality interests.[10] Thus, where an employer's questioning is overbroad and impinges on employees' Section 7 confidentiality interests, the Board will strike the balance in favor of employee rights.[11] For instance, in *Guess*, the Board found that the employer violated the Act when, during a deposition concerning an employee's workers' compensation claim, it asked the employee for the names of coworkers who had attended meetings at a union hall.[12] The employer argued that the question was necessary for it to identify potential witnesses to whether the employee had sustained her injuries while performing activities on behalf of the union or had engaged in physical activities at the union hall that were inconsistent with her injuries.[13] The Board, in rejecting that defense, assumed that the question was relevant and had a lawful objective; nonetheless, it found that the need for the inquiry "was only marginal," and was outweighed by the employee's Section 7 interests, because the question was overbroad: it was not limited to the particular time period during which the employee claimed to have been injured and did not ask whether any of the

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[9] *Waco, Inc.*, 273 NLRB 746, 747 (1984) (internal quotation marks omitted) (noting that without proper justification, photographing pickets violates the Act because it tends to intimidate employees and "to implant fear of future reprisals"); *see also National Telephone*, 319 NLRB at 421 (rejecting employer's efforts to subpoena information about employees' union activities and noting that "an employer may not surveil its employees to obtain such information, and may not give its employees the impression that it has surveilled—or will surveil—them to obtain such information").

[10] *Guess*, 339 NLRB at 433-35.

[11] *Id.* at 435.

[12] *Id.* at 432.

[13] *Id.*

coworkers, whose names were being sought, had witnessed the employee's activities at the union hall during the period in which she claimed to have been injured.[14]

B. The Duty to Preserve Evidence

Generally, parties have a common law duty to preserve evidence within their "possession, custody, or control" that is potentially relevant to "specific, predictable, and identifiable litigation."[15] For a defendant, that duty is triggered, "at the latest, when the defendant is served with the complaint."[16] Failure to comply with that duty results in spoliation,[17] which prevents other parties to the litigation from obtaining relevant evidence in discovery and undermines the integrity of the judicial process.[18] Consequently, courts have the inherent power to impose sanctions for spoliation.[19]

Various aspects of spoliation law are not well established, especially where electronically stored information is concerned.[20] In particular, what constitutes "control" sufficient to trigger a party's duty to preserve relevant evidence remains unsettled and subject to different standards in different federal judicial circuits.[21] Courts in the Fourth Circuit, which encompasses the district court where the

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[14] *Id.* at 434-35.

[15] *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 521-38 (D. Md. 2010) (internal quotation marks omitted).

[16] *Id.* at 522.

[17] THE SEDONA CONFERENCE, THE SEDONA CONFERENCE GLOSSARY: E-DISCOVERY & DIGITAL INFORMATION MANAGEMENT 43 (4th ed. 2014), *available at* https://thesedonaconference.org/download-pub/3757 ("Spoliation is the destruction of records or properties, such as metadata, that may be relevant to ongoing or anticipated litigation, government investigation or audit.").

[18] *See Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 590-91 (4th Cir. 2001).

[19] *Id.* at 590.

[20] *See* THE SEDONA CONFERENCE, COMMENTARY ON RULE 34 AND RULE 45 "POSSESSION, CUSTODY, OR CONTROL" 3-4 (2015), *available at* https://thesedonaconference.org/download-pub/4115 [hereinafter SEDONA COMMENTARY].

[21] *See id.* at 4-12.

employees' FLSA suit is pending, apply two different standards: the "legal right plus notification standard" and the "practical ability standard."[22]

Under the "legal right plus notification standard," a party must preserve, collect, search, and produce evidence that it has a "legal right" to obtain and must also notify its adversary in litigation about potentially relevant evidence held by third parties.[23] Applying the "legal right" criterion, one court outside of the Fourth Circuit denied a plaintiff's motion to compel production of text messages sent or received by a corporate-defendant's employees' personal cell phones that mentioned the plaintiff and/or his allegations of discrimination, harassment, and/or retaliation.[24] The court reasoned that the corporate defendant did not have "possession, custody, or control" of the text messages because it did not issue the cell phones to the employees, the employees did not use the cell phones for any work-related purpose, and the corporate-defendant otherwise did not have any legal right to obtain employee text messages on demand.[25]

Under the "practical ability standard," a party must preserve, collect, search, and produce evidence "irrespective of that party's legal entitlement or actual physical possession of the documents," so long as it has the "practical ability" to obtain the evidence.[26] While some courts have stated that "practical ability" means "the possibility that a party could potentially obtain the documents on demand," there is no "precise, commonly-accepted definition of 'practical ability.'"[27] That is particularly true in the employer-employee context,[28] where "no court has squarely held that the [p]ractical [a]bility [s]tandard can compel corporate parties to produce documents and [electronically stored information] in the possession of current employees."[29] Nor has any court ever specifically held that corporations have the "practical ability" to obtain information from employees' social media accounts merely by asking employees to

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[22] *Id.* at 7 n.14 (citing cases).

[23] *Id.* at 4-7.

[24] *Id.* at 17-18 (citing *Cotton v. Costco Wholesale Corp.*, No. 12-2731, 2013 WL 3819974 (D. Kan. July 24, 2013)).

[25] *Cotton*, 2013 WL 3819974, at *6.

[26] SEDONA COMMENTARY at 6-7 (italics omitted).

[27] *Id.* at 13 & n.37.

[28] *See generally id.* at 4, 17-19, 23-25.

[29] *Id.* at 18.

produce or preserve that evidence.[30] On the contrary, employers generally "do[] not have 'control' over or the right to access personal information and data stored on home or personal computers, personal email accounts, personal PDAs, etc., of its employees."[31] Moreover, as the above-cited commentary distributed by the Sedona Conference[32] states, a broad interpretation of the practical ability standard could result in employer demands for evidence held by employees that are improper, "coercive,"[33] and that conflict with state and federal laws protecting various aspects of social media use by employees.[34]

C. Application

Applying the above-cited principles, we find that the Employer's issuance of the litigation hold and document preservation notice reasonably tends to chill the employees' protected concerted activity in pursuing their collective action suit. Strictly speaking, the notice only requires the employees to preserve certain documents and does not demand that the employees turn them over to the Employer. Still, that requirement, and the attendant threat of discipline and potential termination for failure to comply, makes clear to employees that the Employer has an interest in, and is concerned about, their protected activity. As in *Waggoner*, the Employer's action tends to inhibit the employees' willingness to engage in the suit and related Section 7 activities. Moreover, as when an employer surveils its employees' activities, the Employer's issuance of the notice here reasonably tends to create a fear among the employees that the information subject to the litigation hold might, in the future, be demanded and used against them.[35] That the Employer has

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[30] *Id.* at 24.

[31] *Id.* at 25 (but noting potential complications if any employer has a "Bring Your Own Device to Work" policy).

[32] The Sedona Conference is a non-partisan law and policy think tank focused on antitrust law, complex litigation, and intellectual property legal issues. It issues influential e-discovery guidelines that are frequently cited in judicial decisions and consulted by businesses and other organizations.

[33] SEDONA COMMENTARY at 18.

[34] *Id.* at 24-25 & nn.77-79, 81 (citing state privacy statutes, the NLRA, and a case involving the attorney-client privilege).

[35] *See Waco,* 273 NLRB at 747; *see also National Telephone*, 319 NLRB at 421 ("That the [employer] has sought this information through cross-examination, rather than through surveillance or interrogation of employees, does not reduce the potential chilling effect . . . that could result from employer knowledge of the information.").

not taken steps to enforce the notice against the employees thus far is irrelevant.[36] Indeed, although such evidence is not required to establish a violation,[37] the fact that employees have stopped using certain platforms to communicate regarding their suit supports our conclusion.

Next, applying the *Guess* framework, we find that the employees' Section 7 confidentiality interests outweigh the Employer's need to preserve documents and other information contained on the employees' personal devices, as required by certain portions of the notice. As the Board did in *Guess*, we assume arguendo that the information subject to the notice is sufficiently relevant to the issues in the lawsuit, such that, absent countervailing employee rights, the notice would be appropriate, and that the Employer did not have an illegal objective in issuing the notice.[38] Moreover, we emphasize that our conclusion here does not extend to litigation hold notices in general, many of which, when properly drafted, serve important employer needs without infringing upon employees' Section 7 interests. However, in the circumstances of this case, we conclude that portions of the Employer's notice are unduly broad. In particular, we find the following portions of the notice (all designated in bold italics below) unlawful.

First, the two portions of the notice that explicitly refer to employees' personal devices are unlawful:

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[36] *See Cintas Corp. v. NLRB*, 482 F.3d 463, 467-68 (D.C. Cir. 2007) (affirming that "the Board is under no obligation to consider" evidence of employer enforcement of overbroad work rule against Section 7 activity).

[37] *See id.* at 467 (evidence that employees actually interpreted overbroad rule as prohibiting Section 7 activity not required); *Waco, Inc.*, 273 NLRB 746, 747-48 (1984) (finding rule unlawful even though "[n]o employee testified that [it] inhibited him from engaging in protected activity").

[38] There are some questions about what the *Guess* Board meant by "illegal objective" in the discovery request context. *See Stock Roofing Co.*, Case 18-CA-19622, et al., Advice Memorandum dated May 26, 2011, at 5 n.4. Assuming arguendo that the Board meant "illegal motivation," we observe that the Employer did not issue the notice exclusively to employees who had filed the FLSA suit, but also issued it to another employee and management and HR personnel. In addition, because a litigation hold only becomes necessary in connection with a particular legal matter and does not necessarily involve an employer's entire workforce, we do not view the Employer's selective issuance of the notice here, without more, as evidence of discriminatory motivation.

> At this time, you are only required to preserve potentially relevant records and documents and therefore should not alter or destroy them. You do not need to make copies or otherwise distribute any potentially relevant document. Accordingly, you should take steps to preserve all potentially relevant documents and records, no matter their form, ***and even if they appear on your personal cell phone, personal computer, personal social media page, or personal journal/diary/calendar, among other things.***
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> * * *
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> Potentially relevant documents and records must be preserved whether in electronic or paper format, and ***whether contained on personal*** or Company-owned computers, phones or devices. If you have any doubts as to whether any documents, records, communications, or information in your possession or control are relevant, err on the side of preservation.

These provisions sweep into the notice's scope records of purely personal communications among employees, on their own personal devices, regarding the workplace grievances underlying their suit, as well as records relating to their pursuit of the specific FLSA claims—all information related to clearly protected Section 7 activity that the employees have an interest in keeping confidential. Not only is that interest not diminished by the fact that (b) (6), (b) (7)(C) in the FLSA suit,[39] but the inf er's notice reasonably includes, among other things, non-public employee communications regarding the issues in the lawsuit or the lawsuit itself, as well as evidence of Section 7 activities undertaken by employees not named as plaintiffs in the FLSA suit.[40] Moreover, as noted further below, because there are serious doubts as to whether such records on employees' personal devices would be considered to be within the Employer's "possession, custody, or control," its need for these provisions is less than compelling.

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[39] *See Manorcare Health Services—Easton*, 356 NLRB No. 39, slip op. at 34 (Dec. 1, 2010) (rejecting argument that employees who engage in Section 7 activity in a public setting thereby waive their right to confidentiality), *enforced*, 661 F.3d 1139 (D.C. Cir. 2011).

[40] *See id.* ("[I]f the employer does not learn of [employees' public] involvement [in Section 7 activity]. . . by no sound logic is the employee obligated thereafter to disclose [it] and by no logic is the employer free to demand an accounting of who participated in the public event.").

Second, two of the bullet points in the notice describing what the Employer considers to be "potentially relevant documents or records" are unlawful:

- ***Any documents or records about or concerning EMTs and/or Paramedics regarding any of the allegations;***

- ***Any documents or records which reflect, demonstrate or discuss Medical Transport EMTs' or Paramedics' attendance, participation, and/or travel at trainings, seminars, or other continuing professional educational courses.***

These portions of the notice reasonably encompass the same sort of information stored on employees' personal devices as do the previously identified provisions and are unlawful for the same reasons.[41] In fact, even absent the other unlawful provisions, these portions of the notice would reasonably be read to include information on employees' personal devices, unless the Employer added an explicit savings clause to the contrary. The broad wording of these bullet points illustrates this. The references to documents "regarding any of the [FLSA] allegations" and those that "reflect, demonstrate or discuss" certain employee activities lack any indication as to either the time of creation of those documents or the time of the events to which the documents relate, and so reasonably bring within their scope communications *about* the suit among employees and/or among employees and their attorneys, which were made on the employees' personal devices.

Third, the following language, which requires the employees to comply with the notice as a condition of their employment, clearly includes the unlawful provisions and thus unlawfully infringes upon the employees' Section 7 interests:

> You have been identified as someone who may be in possession of documents or records that could be relevant to this dispute. Thus, you are required to continue to preserve and retain all potentially relevant records

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[41] Although these portions of the notice do not explicitly mention personal devices, to the extent that that there is any ambiguity in the notice, it should be construed against the Employer, which drafted and issued the document. *See Lafayette Park Hotel*, 326 NLRB at 828; *Flex Frac Logistics, LLC*, 358 NLRB No. 127, slip op. at 2 (Sept. 11, 2012) ("Board law is settled that ambiguous employer rules—rules that reasonably could be read to have a coercive meaning—are construed against the employer. This principle follows from the Act's goal of preventing employees from being chilled in the exercise of their Section 7 rights—whether or not that is the intent of the employer—instead of waiting until that chill is manifest, when the Board must undertake the difficult task of dispelling it."), *enforced*, 746 F.3d 205 (5th Cir. 2014).

> and documents. ***Strict compliance with this notice is required as a condition of employment***, as non-compliance could result in the loss of evidence and potential sanction against the company.
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> Sentara takes its preservation obligation very seriously and, therefore, ***failure to comply with this notice could result in discipline up to and including termination of employment***.

Against the employees' interest, the only need that the Employer has asserted for issuing the notice is its duty to avoid spoliation of material evidence related to the ongoing FLSA litigation. We find that to be an insufficient justification in the circumstances of this case. Specifically, while the Employer would have had a legitimate need to issue a properly tailored notice encompassing certain material evidence related to the FLSA suit, it had no need to issue the overly broad notice that it did, which encompasses records bearing minimal relation to its duty to avoid spoliation. On the contrary, since a more narrowly tailored litigation hold notice (e.g., one excluding records stored on employees' personal devices regarding activities related to their decision to concertedly pursue the FLSA suit) would have satisfied any legal duty the Employer had to avoid spoliation, there is no legitimate purpose for the notice here.[42] In addition, the more than three-month delay between the employees' filing of the FLSA suit and the Employer's issuance of the notice indicates that its interest in avoiding spoliation is less than compelling.[43] Since the employees' confidentiality interest in their Section 7 activities outweighs the employer's need for

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[42] *See Cintas*, 482 F.3d at 470 (finding overbroad workplace rule unlawful because "[a] more narrowly tailored rule that does not interfere with protected employee activity would be sufficient to accomplish the Company's presumed interest in protecting" certain workplace information); *Guardsmark, LLC v. NLRB,* 475 F.3d 369, 380 (D.C. Cir. 2007) (finding that even where employer had legitimate interest in restricting certain conduct, "it had an obligation to demonstrate its inability to achieve that goal with a more narrowly tailored rule that would not interfere with protected activity"); *NLRB v. Ne. Land Servs.*, 645 F.3d 475, 483 (1st Cir. 2011) (rejecting employer's "legitimate business reasons" defense for overbroad workplace rule and observing that "a more narrowly drafted provision" would accomplish employer's goal).

[43] *See Victor Stanley*, 269 F.R.D. at 522 (duty triggered, at the latest, when the complaint is filed).

the notice under the third step of the *Guess* framework, the issuance of the notice is unlawful.[44]

We acknowledge that the Employer's notice here is generally similar to those commonly issued by businesses and other organizations involved in litigation and that the Employer's issuance of the notice may have been genuinely motivated by a desire to avoid spoliation sanctions. However, under current law, it is far from clear that the Employer would even be deemed to have a duty to avoid spoliation of the evidence encompassed by the objectionable portions of the notice. As explained in Section B above, it is not certain that evidence contained on employees' "personal . . . computers, phones or devices" would fall within the Employer's "possession, custody, or control," regardless of whether the "legal right" or "practical ability" standard were applied. In any event, there is no caselaw holding that an employer has a duty to require its employees to preserve evidence when (i) such preservation would have an

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[44] In other contexts, Advice has expressed concerns about the continued validity of *Guess* in light of *BE & K Constr. Co. v. NLRB*, 536 U.S. 516 (2002), and the Board's subsequent decision on remand, 351 NLRB 451 (2007). *See Stock Roofing,* Case 18-CA-19622, et al., Advice Memorandum dated May 26, 2011, at 5 n.4; *Chinese Daily News*, Case 21-CA-36919, et al., Advice Memorandum dated December 29, 2006, at 2 n.6; *Cintas Corp.*, Case 29-CA-27153, Advice Memorandum dated May 24, 2006, at 5 n.14. Those concerns are largely inapplicable here because any First Amendment interests held by the Employer and implicated by Board action in this case are highly attenuated. The Employer did not file suit here and has not even asserted that its issuance of the notice was needed to preserve documents necessary to its own defense in the FLSA suit. Rather, the Employer has only invoked its duty to avoid spoliation, which functions largely to prevent destruction of evidence needed by a party's *adversary* in litigation. *See Victor Stanley*, 269 F.R.D. at 526. At best, the Employer might argue that a Board order mandating rescission of portions of the notice would result in the concerned employees' destruction of evidence relevant to their FLSA claims and that the employees might then seek court-imposed sanctions based on the Employer's failure to take necessary action to preserve the destroyed evidence. "To verbalize the claim is to recognize how distant the burden is from the asserted right." *Univ. of Pa. v. EEOC*, 493 U.S. 182, 200 (1990) (rejecting First Amendment claim where the purported constitutional harm was too attenuated from the government agency's action). That attenuation is particularly apparent in light of the broad discretion that courts have in imposing sanctions for spoliation. *See, e.g.*, *Victor Stanley*, 269 F.R.D. at 522 (internal quotation marks omitted) (noting that "whether preservation or discovery conduct is acceptable in a case depends on what is *reasonable,* and that in turn depends on whether what was done—or not done—was *proportional* to that case and consistent with clearly established applicable standards" (internal quotation marks and brackets omitted)).

unlawful chilling effect on the employees' federal statutory rights and (ii) that evidence is stored on the employees' personal devices and was, for the most part, not created within the scope of the employees' employment.[45] In this connection, we emphasize that we do not find unlawful other aspects of the notice, such as its requirement that employees preserve evidence stored on non-personal devices that reasonably relates to the issues in the FLSA suit. For example, the bullet point referring to "[a]ny documents or records evidencing or refuting that employees in these positions' [*sic*] performed work while off-the-clock," as well as the two subsequent, similarly worded bullet points, are tailored to the allegations in the FLSA suit and would not reasonably be read to encompass employees' Section 7 communications on personal devices. Such specifically-worded provisions, moreover, contrast with the overbroad portions of the notice and show the Employer's ability to tailor the notice to avoid unlawful overbreadth.

In addition, sanctions are discretionary and highly dependent upon both the facts of the individual case and the purposes that they would serve. Here, the duty to preserve is unclear as to employees' personal devices, clearly defined federal statutory rights under the Act militate against preservation that extends to those personal devices, and there is no specific discovery order in effect. In this context, the potential for sanctions, especially severe ones,[46] is attenuated, if not speculative. While it might be contended that the Employer should not be required to undertake even that risk, the Employer should not be permitted to rely upon purely speculative and tenuous concerns about spoliation sanctions to privilege conduct that clearly impinges on employees' rights under the Act. And finally, because the employees, as plaintiffs in the FLSA suit, have their own duty to preserve relevant evidence, Board-ordered rescission of the unlawful portions of the notice will not impair the judicial process.[47] Instead, it will simply remedy the unwarranted chilling effect resulting from the Employer's issuance of the notice, not as a mere private litigant, but *as the employees' employer* (a point underscored by its threat of discipline up to termination for failure to comply with the notice).

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[45] Although there is evidence that some employees used personal devices for work on a very limited basis, the wording of the notice also encompasses other devices, such as personal home computers, which there is no indication were ever used for work-related purposes.

[46] *See United States v. Shaffer Equip. Co.,* 11 F.3d 450, 462 (4th Cir. 1993) ("[W]hen a party *deceives a court or abuses the process at a level that is utterly inconsistent with the orderly administration of justice or undermines the integrity of the process*, the court has the inherent power to dismiss the action" (emphasis supplied)).

[47] In fact, the Employer has never asserted that the notice is needed to preserve evidence necessary to its own defense.

Accordingly, the Region should issue complaint, absent settlement.

/s/
B.J.K.

ADV.05-CA-145731.Response.MedicalTransportLLC (b) (6), (b) (7)